Karuppannan v Balakrishnen (Chong Lee Chin & Ors, third parties)

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-70-92
PEH SWEE CHIN, MOHAMED DZAIDDIN AND LAMIN FCJJ
23 SEPTEMBER 1994

Land Law *— Trespass — Encroachment on land and to airspace — Encroachments existed when land purchased — Rights of owner over land — Whether purchaser liable for trespass — Whether purchaser's lack of knowledge relevant*

Tort *— Trespass to land and airspace — Encroachment by protruding side windows, exit, sewerage system, manholes and septic tank on adjoining vacant land — Undertaking given by owner's predecessor-in-title to remove side windows when land required for construction — Owner was purchaser without notice of undertaking — Whether liable for trespass — Whether bound to remove encroachments*

Civil Procedure *— Interlocutory mandatory injunction — Encroachments to plaintiff's land — Whether injunction before trial appropriate as it gave the whole remedy sought*

Words and Phrases *— 'Encumbrances'*

The respondent is the registered owner of the land held under HS(D) 197 PT No Lot 25, Section 3, Brinchang, Cameron Highlands ('Lot 25'), while the adjacent lot, ie Lot 26, belongs to the appellant. On Lot 26, there was a four-storey shophouse which had been converted into a hotel. The appellant's predecessor-in-title, Mdm Chong, had applied for permission to build side windows protruding into Lot 25 for aesthetic value and undertook to remove them so they would not obstruct the construction of any building on Lot 25 which was then still vacant. Her application was approved on condition that the protrusions had to be removed the moment the registered owner of Lot 25 intended to build on it. Subsequently, the respondent, who intended to build a hotel on Lot 25, asked the appellant to remove the protrusions, but the appellant failed to do so. The respondent also alleged trespass against the appellant for constructing a side exit, sewerage system, manholes and septic tank which encroached on Lot 25. The respondent's application for an interlocutory mandatory injunction to compel the appellant to remove the protrusions and encroachments was granted. The appellant appealed on the grounds that: (i) the injunction gave the respondent the full relief sought without trial; and (ii) the official search at the land office did not disclose any conditions and therefore, he was an innocent purchaser without notice of the conditions or undertakings attached to the building on Lot 26.

Held, dismissing the appeal:

(1) The law has clearly spelt out the right of an individual over his land, that is, inter alia, he is given the exclusive use of the airspace above the surface of his land. Therefore, the appellant

had no legal right to encroach into the airspace of Lot 25 unless the respondent allowed it.

(2) Mdm Chong's undertaking to remove the protrusions was a personal undertaking which did not require endorsement on the document of title. However, as the appellant was a local resident, and, Brinchang being a small town, the court took judicial notice of the fact that most of the residents knew one another and the development taking place. The appellant must have known the boundaries of his land and very likely must have enquired of the protrusions. In any event, with or without knowledge of the protrusions and encroachments, he was answerable in law for the trespass into the airspace and land of his neighbour and, being the current registered owner, he was duty bound to remove them. Compensation from Mdm Chong may be his only redress for expenses incurred.

(3) Once the respondent had established his legal right and its violation, he was entitled to a perpetual injunction unless the appellant could show special circumstances. This case constituted an unanswerable case of private nuisance for which an interlocutory mandatory injunction was the appropriate and necessary remedy even though it gave the whole remedy asked for in the action.

Per curiam:

(1) The word 'encumbrances' consists of conditions or restrictions in interest that normally appear on a document of title to land and also any matter concerning the land or its owner which fetters the right of the owner to deal with his land or to enjoy his land in the normal way.

(2) A buyer of land should also make searches at government offices or local authorities, other than at a registry of titles or land office, for anything concerning the land in an adverse way, eg conditions imposed on the landowner or his predecessor-in-title, or make written requisitions to the vendor for information adverse to the land as conveyancing solicitors in England are accustomed to.

[Bahasa Malaysia summary

Responden merupakan pemunya berdaftar tanah yang dipegang di bawah HS(D) 197 PT No Lot 25, Seksyen 3, Brinchang, Cameron Highlands ('Lot 25'), sementara lot bersebelahan, iaitu Lot 26, dipunyai oleh perayu. Di atas Lot 26, terdapat sebuah rumah kedai empat tingkat yang telah diubahsuai kepada sebuah hotel. Pendulu dalam hakmilik perayu, Mdm Chong, telah memohon kebenaran untuk membina tingkap tepi yang menonjol ke Lot 25 untuk tujuan mencantikkan dan memberi akujanji untuk menanggalkan tingkap itu supaya tidak menghalang pembinaan bangunan di atas Lot 25 yang masih lapang pada masa itu. Permohonan beliau telah diluluskan atas syarat bahawa bonjolan tersebut mesti ditanggalkan sebaik sahaja pemunya berdaftar Lot 25 berniat untuk membina di atasnya.

Kemudiannya, responden, yang berniat untuk membina sebuah hotel di atas Lot 25, telah meminta perayu supaya menanggalkan bonjolan itu, tetapi perayu gagal berbuat demikian. Responden juga mengatakan bahawa perayu telah mencerobohi tanahnya kerana membina sebuah pintu keluar tepi, sistem pembetungan, lurang dan tangki septik yang menceroboh ke Lot 25. Permohonan responden untuk suatu injunksi interlokutori mandatori untuk memaksa perayu supaya menanggalkan bonjolan dan cerobohan itu telah dibenarkan. Perayu telah membuat rayuan atas alasan bahawa: (i) injunksi itu telah memberikan responden relief penuh yang dipohonnya itu tanpa perbicaraan; dan (ii) carian rasmi di pejabat tanah tidak mendedahkan sebarang syarat dan oleh itu, beliau merupakan seorang pembeli ikhlas tanpa notis tentang syarat atau akujanji yang terikat kepada bangunan itu di atas Lot 26.

Diputuskan, menolak rayuan itu:

(1) Undang-undang telah menjelaskan dengan terang hak seseorang ke atas tanahnya, iaitu antara lain, beliau diberi kegunaan eksklusif ruang udara di atas permukaan tanahnya. Oleh demikian, perayu tidak mempunyai hak di sisi undang-undang untuk mencerobohi ruang udara Lot 25 kecuali jika responden membenarkannya.

(2) Akujanji Mdm Chong untuk menanggalkan bonjolan itu merupakan suatu akujanji peribadi yang tidak perlu diendorskan di atas dokumen hakmilik. Bagaimanapun, oleh kerana perayu adalah seorang pemastautin tempatan, dan Brinchang adalah sebuah pekan kecil, mahkamah memberi pengiktirafan kehakiman tentang hakikat bahawa kebanyakan daripada pemastautin kenal satu sama lain dan tahu tentang pembangunan yang berlaku. Perayu semestinya tahu akan had tanahnya dan besar kemungkinannya bahawa beliau telah membuat pertanyaan tentang bonjolan tersebut. Bagaimanapun, beliau bertanggungjawab di sisi undang-undang untuk pencerobohan ke ruang udara dan tanah jirannya sama ada dengan ataupun tanpa pengetahuan tentang bonjolan dan cerobohan tersebut, dan, sebagai pemunya berdaftar masa kini, beliau wajib menanggalkannya. Pampasan daripada Mdm Chong mungkin merupakan cara yang tunggal untuk menebus rugi perbelanjaan yang dialaminya.

(3) Sebaik sahaja responden membuktikan haknya di sisi undang-undang dan bahawa ianya telah dilanggar, beliau berhak mendapat suatu injunksi berkekalan kecuali jika perayu berjaya menunjukkan keadaan khas. Kes ini merupakan suatu kes kacau-ganggu persendirian yang tidak dapat dijawab dan untuk mana suatu injunksi interlokutori mandatori adalah remedi yang sesuai dan perlu walaupun ia memberikan keseluruhan remedi yang dipohon di dalam tindakan ini.

Per curiam:

(1) Perkataan 'bebanan' terdiri daripada syarat atau sekatan kepentingan yang biasanya kelihatan di atas sesuatu dokumen

hakmilik tanah dan juga sebarang perkara berkenaan dengan tanah itu atau pemunya tanah itu yang membelenggu hak pemunya untuk berurusniaga dengan tanahnya atau menikmatinya dalam cara biasa.

(2) Seseorang pembeli tanah seharusnya juga membuat carian di pejabat kerajaan atau pihak berkuasa tempatan, selain daripada pejabat pendaftar hakmilik atau pejabat tanah, mengenai sebarang perkara yang menjejaskan tanah itu, contohnya syarat yang dikenakan ke atas pemunya tanah itu atau pendulu dalam hakmiliknya, atau membuat rekuisisi bertulis kepada penjual untuk mendapatkan maklumat yang menjejaskan tanah itu seperti yang biasa dilakukan oleh peguamcara pemindahhakan di England.]

Notes

For cases on trespass to land, see 8 *Mallal's Digest* (4th Ed) paras 2120–2146; 12 *Mallal's Digest* (4th Ed) paras 658–687; [1989] Mallal's Digest 1144; [1990] Mallal's Digest 900, 1197; [1991] Mallal's Digest 1972–1974; [1992] Mallal's Digest 1285, 1669; [1993] Mallal's Digest 1297.

For cases on interlocutory mandatory injunctions, see 2 *Mallal's Digest* (4th Ed) paras 1115–1119; [1990] Mallal's Digest 284; [1992] Mallal's Digest 255.

Cases referred to

Ng Yee Fong & Anor v EW Talalla [1986] 1 MLJ 25 (folld)

Shephard Homes Ltd v Sandham [1971] Ch 340; [1970] 3 All ER 402; [1970] 3 WLR 348 (folld)

Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 (refd)

Legislation referred to

National Land Code 1965 ss 5, 115, 116, 120

Appeal from: Civil Suit No 22–227–1990 (High Court, Ipoh)

Pushpam Subramaniam (*R Jegathesan* with her) (*Pushpam & Co*) for the appellant.

VS Vismanathan (*Kean Chye & Sivalingam*) for the respondent.

Cur Adv Vult

Lamin FCJ (delivering the judgment of the court): This is an appeal on the order of the learned judge below made on 22 January 1992 granting the interlocutory mandatory injunction as prayed for by the respondent/plaintiff in prayers (c) and (d) in his summons-in-chambers dated 22 September 1990. The rest of the prayers are to be determined at the trial of the action itself. The prayers (c) and (d) as in the order read:

It is ordered and directed that the defendant, Karuppannan a/l Chellappan by himself his agents or servants do forthwith:

(c) Seal the side exit and side windows and remove, pull down or demolish the protrusions sewerage piping system manholes and septic tanks and all other illegal and/or unlawful encroachments encroaching upon or overhanging any part of HS(D) 197 No PT Lot 25 Section 3 in the Township of Brinchang, Cameron Highlands in the State of Pahang.

(d) Alternatively, in the event that the defendant does not comply with the order of court within thirty (30) days from the date of this order of court herein, the plaintiff or his agents or servants be entitled to do so at the costs of the defendant.

The respondent/plaintiff is the registered owner of the land held under HS(D) 197 PT No Lot 25 Section 3 in the township of Brinchang, Cameron Highlands in the State of Pahang. The adjacent lot, ie Lot 26, belongs to the appellant/defendant. In Lot 26, there was originally a four-storey shophouse erected and subsequently, as alleged in the respondent/plaintiff's statement of claim, the same building was converted into a hotel. The appellant/defendant's predecessor-in-title, Mdm Chong Lai Chun, by her letter to the Pengerusi Lembaga Bandaran Cameron Highlands dated 31 October 1978, applied that she be allowed to build the side windows with protrusions to them (protruding into Lot 25) purely for aesthetic value (untuk tujuan mencantikkan) and at the same time in her application she undertook to remove them so that they would not obstruct the construction of any building in the neighbouring lot and without making any claim for compensation. At the time of application, Lot 25 was still a vacant lot. Her application was approved and in the approval letter it was repeated that those protrusions encroaching into the neighbouring lot must be removed the moment the registered owner intends to have a building on it. Now that the vacant lot (Lot 25) has a registered owner currently in the person of the respondent/plaintiff and because he intends to build a hotel on it, the plan of which has been approved, he has therefore asked the appellant/defendant to remove those protrusions. But the appellant/defendant has failed to do so hence the filing of the above-said summons-in-chambers and a writ. The respondent/plaintiff is also alleging trespass against the appellant/defendant for having constructed a side exit to the said building, sewerage piping system, manholes and septic tank.

Cik Pushpam Subramaniam, counsel for the appellant/defendant, in dealing with grounds 8, 9, 10 and 15 of her memorandum of appeal submitted that her client purchased a four-storey hotel building together with land, ie Lot 26 on which the hotel stands, and for the purpose entered into a sale and purchase agreement on 20 January 1984 and the sale was complete upon making final payment of the purchase price within three months and that would have been 19 April 1984. It is true that that date coincides with the date of the issue of the certificate of fitness for occupation of the said four-storey building. At the time of purchase, the adjacent Lot 25 was still a vacant land. Learned counsel submitted that her client was an innocent purchaser without notice of any of the conditions or undertakings attached to the construction of the building on Lot 26. She said an official search was conducted and there was no disclosure of conditions. The certificate of fitness too was issued without any condition.

A Even the sale and purchase agreement, she said, did not disclose any encumbrance or undertaking. She went on to say that the valuation report undertaken by Messrs Khong and Jaafar Sdn Bhd at the insistence of the bank (HSBC) too did not disclose any encumbrance. As her client had no notice of Mdm Chong Lai Chun's undertaking to remove all those
B protrusions, he was not legally bound to comply. Even if he knew, he could not be made to comply and in fact according to her, since the Lembaga Bandaran approved it, it would be for the Lembaga Bandaran to pull them down.

In this case, it is quite clear to us that Mdm Chong's letter of application dated 31 October 1978 contains an undertaking to remove
C those protrusions. It would appear that the said Lembaga Bandaran allowed their construction on condition that she would keep her promise or undertaking to remove them. In our view, this is nothing more than a personal undertaking. Having taken that stand and in view of the circumstances of this case, we really need not trouble ourselves to go any
D further. However, after having heard counsel's submission impressing upon us that such an undertaking was something of a creature that could be traced in the land office if there was one (though learned counsel never attempted to enlighten us whether it is capable of registration or endorsement) we feel bound somewhat to give a little explanation what that creature is in the context of the National Land Code 1965 ('the
E Code'). The Code allows certain types of conditions and restrictions in interest to be endorsed on a document of title in respect of an alienated land. Section 5 of the Code lays down the definition of what 'condition' is and what 'restriction in interest' is. It says '"condition" does not include any restriction in interest'. 'Restriction in interest' means any limitation
F imposed by the state authority on any of the powers conferred on a proprietor by Pt Nine or on any of his powers of dealing under Div IV, and any like limitation imposed under any previous land law. As to 'condition' there are two types, one is called 'implied' and the other 'express'. 'Implied' conditions are those imposed by the Code on the various categories of land use such as 'agriculture' (s 115), 'building' (s 116) and so on.
G None of the implied conditions the character of which comes anywhere close to the 'undertaking' in our case. Some semblance of it may be read into s 116(1)(d) which reads: '... that no such building shall be demolished, altered or extended without the prior consent in writing of the appropriate authority'.

H This provision talks about demolition, alteration and extension of the building itself and not something pertaining to the decorative aspect of the building. They refer to something permanent and the further legal requirement in regard to the construction of buildings is that they must be confined within the boundaries of the particular lot as is reflected in condition (i) contained in the letter of the Lembaga Bandaran of 28 March
I 1978. Condition (i) of the said letter reads, 'Balcony menunjul ke lot sebelah tidak diluluskan'. The Lembaga in its subsequent letter of 22 December 1978 repeated the condition in para 2 which reads:

> Binaan-binaan yang menyentuh/menonjol ke dalam lot sebelah (sekarang ini kawasan lapang) apabila diberi hak milik dan yang berkenaan bercadang mendirikan bangunan maka binaan-binaan itu hendaklah dibuka iaitu seperti window shades dan door steps tanpa menuntut ganti rugi dan sebagainya.

The 'undertaking' in our case does not, therefore, relate to the implied condition as above and even if it does, it is certainly one that does not require endorsement on the document of title as it is a statutory direction. Whereas 'express' conditions and restrictions in interest (conformable to law) must be endorsed on the document of title as is required by s 120(3) of the Code. They must first 'be determined by the state authority at the time when the land is approved for alienation' (s 120 (3)). The express conditions that can be imposed on the category of land use for 'building' are those:

> 122 ... with respect to —
>
> (a) the area or proportion of the land to be built upon;
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> (b) the type, design, height and structure of any building to be erected on the land, and the type and quality of the materials to be used in its construction;
>
> (c) the dates on or before which any such building is to be commenced or completed;
>
> (d) the use to which any building is to be put.

The undertaking to remove those protrusions which are really decorative in nature cannot come within the requirement of s 120 and, therefore, are not capable of being endorsed on the title and so will not be traceable at the land office. Neither is it a type of 'condition' that is envisaged in s 116(1). The intrusion, in our view, that the Lembaga Bandaran was concerned about was something affecting trespass to airspace. The Code provides that any person or body to whom land has been alienated, reserved land has been leased or temporary occupation licence has been granted in respect of any land 'shall be entitled to the exclusive use and enjoyment of so much of the column of airspace above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment of the land' [s 44(a)]. In clear terms, the law has spelt the right of an individual over his land. He is given the 'exclusive use and enjoyment' of the airspace above the surface of his land though not right to heaven above. The owner of Lot 26 has no legal right to encroach into the airspace of Lot 25 unless of course the owner of Lot 25 allows it.

The word 'encumbrances' does not merely consist of conditions or restrictions in interest that normally appear on a document of title to land. It encompasses any matter concerning the land or its owner when any such matter, for example, fetters the right of the owner to deal with his land or to enjoy his land in a normal way. Such encumbrance, which does not appear on a document of title, may take the form of some gazetted intention for compulsory acquisition of land, or the presentation of a winding-up petition against a corporate owner of the land.

In Malaysia, intending purchasers of land commonly make a check or search on the document of title at a registry of titles or land office as the case may be and hope for the best by imposing the familiar condition on the vendor to give a transfer free 'from all encumbrances'.

To avoid potential litigation with such a vendor, a buyer should, in an even better way, also make searches at other government offices or local authorities for anything that concerns the land in an adverse way, such as

A the conditions in question imposed on the landowner or rather the predecessor-in-title of the applicant. The buyer, instead of making a search in the local authorities, etc, can also make written requisitions to the vendor for similar information which is adverse to the land as conveyancing solicitors in England are accustomed to.

B Now, to say that the appellant/defendant has no knowledge of the protrusions, we somehow find it difficult to accept such a statement. His address, as can be seen from the issue document of title at the time of transfer of Lot 26 to himself, is No 20, New Town Brinchang, Cameron Highlands and so he is very much a local resident. We can assume that he has been negotiating for the purchase of the land and building even before C the completion of the building itself since the date of the issue of the certificate of fitness for occupation coincided with the date of final payment of the purchase price of the building. Needless to say that Brinchang is a small town and one can take judicial notice of the fact that most of the residents of the town know one another and also know the kind of D development that takes place from time to time. In the case before us, the appellant/defendant is a local resident and is a purchaser of a four-storey hotel building. With confidence, we say he cannot be a simpleton. He must have visited the land and the building. He must therefore know the boundaries of his land and his counsel even now admits that he now knows where the boundaries are. We are sure not just now. He has known of E them for some time at the very least. Being one who is not a simpleton, he must have noticed and very likely he must also have enquired of the protrusions. With or without knowledge of the existence of the protrusions he is answerable in law in regard to the trespass into the airspace of his neighbour. Being the current registered owner he is duty bound to remove F them. No doubt it is the personal undertaking of Mdm Chong, but she is no more the owner of Lot 26 and the building on it. Compensation from Mdm Chong may be his only redress for expenses incurred in the removal of those protrusions. But that is between him and Mdm Chong. So whatever that protrudes or encroaches into Lot 25 including fire exit and the septic tank, the owner of Lot 25 is entitled to have them removed.

G It is interesting to note that throughout the submission of the counsel for the appellant/defendant, we were made to understand that the building on Lot 26 which the appellant/defendant purchased was a four-storey hotel and she expressed anxiety as to the well-being of the hotel guests should the injunction remain. But the express condition on the title H stipulates 'a shophouse', that is to say the owner was to build a shophouse. This is repeated in the valuation report requested to be prepared by the appellant/defendant himself (see p 267). No less than seven express conditions appear on the title. Condition No (vi) stipulates that, 'The lessee shall not make use of the premises to be erected on the lot hereby leased for any purpose other than that approved by the Chairman, Town I Board, Cameron Highlands'. Even the certificate of fitness for occupation still spells it out as 'Rumah kedai empat tingkat'. All the drawing plans appearing in the appeal record do not reflect that the buildings is that of a hotel.

Counsel for the appellant/defendant in the course of her submission informed us that fraud would be part of her client's defence and prayed for

the appeal to be allowed and to go for trial. We have noted her client's allegation of fraud which appears in para 15(b) of his defence. The allegation is directed solely at the manner of disposal of the 'open space' (Lot 25). Learned counsel informed us that they would be alleging fraud not only against the respondent/plaintiff but also against the Majlis Daerah Cameron Highlands. She gave indications of how the fraud came about. For example, she said that the area of the open space (Lot 25) has been clearly demarcated with adjacent lots having been finally surveyed, and yet only a 'surat hakmilik sementara' was issued to the respondent/plaintiff and not a final title. The yearly land revenue was originally RM30 and then cancelled and substituted with the figure RM400. The appeal before us is against the order dated 22 January 1992 essentially pertaining to the granting of the interlocutory mandatory injunction to the respondent/plaintiff ordering the appellant/defendant to seal, remove and demolish those items as spelt out in the order. We are only concerned with what have been constructed in Lot 26, the parts of which have encroached into Lot 25. We are not convinced how the question of the manner of disposal of Lot 25 and therefore the allegation of fraud can be relevant to the matter before us.

As regard the case for the respondent/plaintiff, he has deposed, inter alia, that he has obtained planning permission to build a hotel on Lot 25 and has entered into a contract with contractors to build the hotel which he did on 29 October 1990. The works were to be completed within 18 months. The Hongkong and Shanghai Banking Corp, Cameron Highlands, had indicated that the banking facilities for the purpose of the construction of the hotel would be withdrawn if construction works did not commence by February 1992. Construction works have however commenced but owing to the trespass on his land and airspace by the appellant/defendant, the works cannot be continued and are at a standstill. He has expended considerable amount of time, effort and money. If the injunction is lifted, he would suffer irreparable damage. Damages would not be an adequate remedy.

Counsel for the appellant/defendant cited the case of *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 in support of her contention that there are no exceptional circumstances as to merit the granting of an interlocutory mandatory injunction before trial. The injunction she mentioned would virtually give the respondent/plaintiff the full relief sought to be secured. With respect, the learned counsel has oversimplified the ratio in *Sivaperuman*.

We need only repeat what Abdoolcader J said [at pp 151–152]:

> I have earlier pointed out that the interlocutory injunction granted is mandatory in effect and substance and the dismissal of the appellant has been referred to and is pending before the Industrial Court as a trade dispute. In *Harold Stephen & Co Ltd & Ors v Post Office* [1978] 1 All ER 939, a decision of the Court of Appeal in England in July last year, Geoffrey Lane LJ said (at p 944):
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> > 'Finally, and most seriously as I see it, the ground on which I would primarily base my decision would be this. It can only be in very rare

A circumstances and in the most extreme circumstances that this court should interfere by way of mandatory injunction in the delicate mechanism of industrial disputes and industrial negotiations.'

It is argued that there have been cases where interlocutory mandatory injunctions have been granted before trial even though the full relief B sought is secured by the respondents. Perhaps more in point is the case of *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25. This is a case where the respondent had applied for and obtained a mandatory injunction to remove the septic tank and fence which formed part of the appellant's premises but which had been constructed on the respondent's land. The appellant purchased Lot 126 with actual knowledge of the encroachment C on the respondent's Lot 179. Full disclosures were made in the sale and purchase agreement as to the encroachment. Notwithstanding that, this court did point out that the respondent never gave his assent either expressly or impliedly to the continued existence of the septic tank and the fence on his land ever since he became aware of it in 1970. Similarly in the D case before us. Here we wish to repeat that once a party and, in this case, the respondent/plaintiff has established his legal right and of the fact of its violation, he is entitled to the perpetual injunction unless the appellant/ defendant can show that there is something special in the circumstances of the case that will disentitle the respondent/plaintiff to the remedy he seeks.

E The facts about the encroachment in question in this case are unusually clear and sharp, constituting an unanswerable case of private nuisance for which an interlocutory mandatory injunction was the appropriate and necessary remedy even though it gave the whole remedy asked for in the action. Please see *Shephard Homes Ltd v Sandham* [1971] Ch 340; [1970] 3 All ER 402; [1970] 3 WLR 348.

F As we have said, in the case of a trespass to land and airspace committed by the owner of an adjacent lot as serious as in this case, the aggrieved owner of the lot upon which trespass is committed is entitled to an interlocutory mandatory injunction by which to have the source of the trespass removed notwithstanding that the source of the trespass had G already been in existence before the new owner came to own the land and whether or not he knew or had notice of it.

As to damages, we are satisfied that this is not a matter of a trivial act of trespass so that the resultant injury or damage can be adequately compensated. The respondent/plaintiff has obtained approval for the construction of a four-storey hotel building and work has commenced and H because of the trespass, they are now at a standstill. With this delay and then the problems of resumption of works and the loss of business will all contribute to the quantum of damages.

In the circumstances, the appeal is dismissed with costs here and below. The deposit in court is to be paid out to the respondent on account I of taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim